Filed 5/29/07 In re Raymundo S. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re RAYMUNDO S., a Person Coming Under the Juvenile Court Law.	B195300 (Los Angeles County Super. Ct. No. CK47682)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MANUEL S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Emily A. Stevens, Judge. Affirmed.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, Jacklyn K. Louie, Deputy County Counsel; UCLA School of Law Clinical Program, Patrick D. Goodman, J. Andrew Boyle, and Kimberley Miller, for Plaintiff and Respondent.

No appearance for Minor.

Manuel S. appeals from an order terminating his parental rights as to Raymundo S. (born in February 2000). Appellant contends he established a parent-child relationship with Raymundo such that termination of his relationship would be greatly detrimental to Raymundo under Welfare and Institutions Code section 366.26, subdivision (c)(1)(A).[1] He further contends that the court violated his due process rights by refusing to permit six-year-old Raymundo to testify at the termination hearing. We find no error and affirm.

BACKGROUND

Raymundo was born to Alma A. and appellant. Mother has another child, Jose A., born in July 1996 who has a different father. Raymundo and Jose were removed from Mother's home on February 7, 2002, when she allegedly struck Jose on the face and body numerous times. The children were returned to Mother's custody on September 4, 2002, under the jurisdiction of the court, and then were removed again, on July 22, 2003 when she again struck Jose. At that time, Mother and appellant were involved in a violent altercation in the presence of the children, during which appellant struck Mother in the head. Raymundo was returned home on November 5, 2003; but the court sought permanent placement for Jose in June 2004 finding that Mother had failed to reunify with him.

Although appellant was not entirely successful in completing his programs to deal with domestic violence, the court terminated jurisdiction over Raymundo and returned him to his parents' custody on June 17, 2004. But this home placement was short-lived. On July 6, 2004, Raymundo was again removed from his home. Appellant reported to the Los Angeles County Department of Children and Family Services (DCFS) that Mother had attacked him the day before and had been incarcerated. He reported that Mother had been hitting and yelling at Raymundo regularly and that the police had intervened on four separate occasions. Appellant stated that he had seen Mother hitting

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Raymundo, and that the ongoing abuse had been occurring for over a year. Raymundo confirmed that his mother had been hitting him. Despite Mother's ongoing abuse of Raymundo, appellant never reported the abuse to the DCFS social worker for fear he would antagonize Mother.

Raymundo was removed from the home and placed with Jose, where he was reported to be very happy. At the August 13, 2004 adjudication and disposition hearing, appellant denied he had seen Mother hit Raymundo, and denied that he had been struck by Mother. The social study reported that appellant failed to recognize any fault on his part in not preventing the abuse. Furthermore, it was reported that appellant was not inclined to participate in court-mandated counseling or therapy because he did not have the time or money for the classes. Appellant never took advantage of low or no cost programs.

The court declared Raymundo a dependent of the court; he was ordered removed from parental custody and placed in the care of DCFS for suitable placement. Appellant was allowed day visits, and DCFS had the discretion to liberalize visitation. Family reunification services were ordered.

On August 23, 2004 appellant requested unmonitored weekend visits with Raymundo, claiming Mother no longer lived with him and that he obtained a restraining order against her. But shortly thereafter, Mother disclosed she had returned to appellant's residence on appellant's invitation and his assurance that "the court did not have to know about it."

In October 2004, the social study reported that despite being allowed unmonitored visits with Jose, with whom Raymundo was living in the same foster home, appellant never visited Jose. This caused great disappointment to Jose, who expected the visits with Raymundo would include him.

In December 2004, Raymundo was diagnosed to be developmentally disabled and in January 2005 began therapy. Appellant refused to believe that his son was in need of services, asserting that his son was not crazy. By January 2005 appellant had attended three individual counseling sessions but still had not participated in a domestic violence

or parenting class. At that time, appellant sought increased visitation asserting that Mother did not live with him. But Mother testified that she was living with appellant. The court found appellant was not able to be truthful and denied the request, but continued reunification services.

In August 2005, the section 366.21, subdivision (f) hearing took place. Appellant had attended 15 sessions of family therapy for violence issues and both parents were participating in marital counseling. The court found the parents to be in compliance but that they had not made sufficient progress. Reunification services were extended in Raymundo's case until January 2006. The court allowed unmonitored visits and permitted DCFS discretion to start weekend overnight visits. Raymundo had been diagnosed with attention deficit hyperactivity disorder (ADHD) and as moderately mentally retarded. The brothers were together in a foster home and the court did not set a section 366.26 hearing for Jose because it concluded it would not be in either boy's best interest to separate them at that point.

In November 2005, a family group decisionmaking meeting was held for Raymundo. Mother, appellant, Raymundo's foster mother, two social workers and a facilitator attended the meeting. Appellant continued to deny that Raymundo had any special needs or required special services. It was also revealed that Raymundo exhibited negative behavior following visits with his parents, and that he needed structure as well as school assistance and therapy. Mother stated that she wanted both children to be allowed to return home, but appellant became very upset, raised his voice and told Mother that she should consider them to be separated and should find another place to live. Mother became sad and after speaking with appellant in private said she had changed her mind and wanted to have only Raymundo return home. She admitted she changed her mind so that she would not have to move out of appellant's home.

During the meeting appellant stated that he did not agree that Raymundo should be taking medication and believed that therapy only contributed to his negative behavior. He did not believe that Raymundo should be forced to learn and thought that Raymundo would learn when he was older and ready to learn.

In February 2006, at the eighteen-month section 366.22 status review hearing, it was reported that both children were responding well to the structured environment of the foster home and supportive services. It was recommended that the children continue as placed and with their respective services. DCFS reported that appellant had been offered family preservation services to provide counseling, special education and therapeutic services for Raymundo if he were returned to appellant's home. Appellant continued to insist that Raymundo did not need counseling or medication, and declined these special services. The children began unmonitored overnight visits on December 24, 2005, but less than a week later Jose was physically abused during a visit, and monitored visits were again instituted. Raymundo was struck on the cheek by Mother during a visit in January and Raymundo reported that appellant and Mother told him not to tell the social worker. Mother's visits were then limited to the DCFS office.

Raymundo's attorney stated that in spite of Raymundo's positive relationship with his parents and her belief that Raymundo cared for appellant, she had concerns whether appellant could meet Raymundo's special needs. The court found that appellant would not protect Raymundo and that he was not capable or competent to take care of a child with disabilities because he denied that they exist. The court concluded that appellant had made no progress since entering the dependency system and that Raymundo continued to face a substantial risk of further abuse. The court remarked that appellant had never taken care of Raymundo himself without letting Mother return to the family home. The court terminated reunification services and set the matter for selection and implementation of a permanent plan.

In April 2006, it was reported that Raymundo's school attempted to contact the parents to schedule an individualized education program meeting to determine a special education plan. Appellant did not reply and Mother expressed no interest in attending. The court granted DCFS's request that the parents' education rights be limited and that Raymundo's caregiver be assigned those rights.

On July 6, 2006, both Jose and Raymundo were placed in the home of Maria A., their maternal grandmother, who was interested in pursuing the children's adoption. At

the time of the section 366.26 hearing in November they had been living with her for five months. She had given up her job to care for the children full time and had moved from Colorado in order to adopt the children. She recognized that the children had special needs and was willing to obtain necessary services for them. She enrolled them in school, drove them to school each day, took care of their medical needs, and complied with the visitation orders for appellant and Mother. Raymundo expressed that their grandmother's home was the best home he had lived in and both children stated they wanted to live together in their grandmother's home. Appellant complained to the social worker that he wanted Raymundo separated from Jose and returned to foster care. He also opposed a petition to authorize psychotropic medication to treat his severe attention deficit disorder.

Appellant filed a section 388 petition seeking to have Raymundo placed in his home or back into the foster care system with reunification reinstated. He claimed he had again separated from Mother, was in counseling and continued to visit Raymundo regularly. The court denied the petition, finding that in the over four years that the case had been in the system appellant had not demonstrated that he was capable of properly caring for Raymundo, that he was in denial of Raymundo's special needs and not receptive to trying to achieve improvement in his school and development in accordance with the professional advice they had received. The court also stated that appellant's display of contempt for Raymundo's sibling was not emotionally or psychologically appropriate for either child. The court found it would not be in Raymundo's best interest to make a change or put him back into a reunification program with a parent who had not demonstrated any ability to implement what he had learned.

As for the section 366.26 hearing, counsel for Raymundo requested that parental rights be terminated. Counsel for appellant asked that Raymundo be called to the stand. The court stated that it was not appropriate to put a 6-year-old on the stand because "to even make it appear that [Raymundo] would be responsible in some way for making a determination" regarding termination of parental rights was not in Raymundo's best interest. Appellant's counsel proffered that Raymundo could testify as to what took place

during visits and his perception of the role that appellant played in his life. The court suggested that appellant could testify to those matters and it was not necessary for the child to testify. Appellant did testify that he brought toys to the child and took him out to eat during their one-hour monitored visits. He also testified that he was Raymundo's father figure and that Raymundo called him "Poppy," and that they were affectionate towards each other. Appellant's attorney then stated that if Raymundo had been permitted to testify, he could have confirmed appellant's testimony.

The court found that the child had a close relationship with appellant, that he loves appellant and that they visit on a regular basis. But the court noted that these facts are not determinative in a section 366.26 hearing because visiting and having a good relationship with a child is not parenting. The court found that Raymundo's ability to stay with his grandmother and his brother in a loving permanent relationship outweighed his relationship with appellant. The court found that guardianship would not be in the child's best interest and found by clear and convincing evidence that Raymundo would be adopted, and ordered appellant's parental rights terminated. This appeal followed.

DISCUSSION

Appellant contends that the juvenile court violated his due process rights when it precluded counsel from examining Raymundo during the 366.26 hearing. He further contends that the court erred in finding that section 366.26, subdivision (c)(1)(A) did not apply. We find no merit to either of these contentions.

I. No Due Process Error in Precluding Minor's Testimony

We fully agree with our Supreme Court which stated in *In re Marilyn H.* (1993) 5 Cal.4th 295, 306, that a parent's interest in the companionship, care, custody and management of his child is ranked among the most basic of civil rights, and that the federal and state Constitutions guarantee that the state shall not deprive any person of life, liberty or property without due process of law. Appellant contends that he was denied due process because he wanted Raymundo to testify as to "his perception of the

role that [appellant] plays in his life," and that fairness and due process required the court to listen to Raymundo to assess the child's demeanor and his depth of emotion about the father/son relationship. Appellant argues that there was no other way for the court to assess Raymundo's feelings. We disagree.

Appellant argues that the court had a mandatory duty to consider the child's wishes. Section 366.26, subdivision (h) provides that in all section 366.26 proceedings, the trial court "shall consider the wishes of the child" prior to ordering termination of parental rights. But this does not necessarily require that the child actually testify. As the court stated in *In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592: "The process must be sufficiently flexible to provide some accommodation to the varying circumstances that will inevitably present themselves. Therefore, we believe the decision in a termination action whether to require a direct statement from the minor regarding his/her thoughts is one that is best left to the sound discretion of the trial judge." The purpose of such an inquiry is to consider, if possible and appropriate, the preferences of the child. (*Ibid.*)

In arguing that Raymundo's wishes were not fully considered, appellant cites to the statement of Raymundo's attorney in February 2006 that Raymundo preferred to live with appellant rather than Mother. But that was before July 2006 when both boys were placed for adoption with their maternal grandmother. It is undisputed that by the time the court considered termination, both boys clearly expressed that hers was the best home they had lived in. Furthermore, everyone involved with this family except appellant recognized that the relationship between the two brothers was a significant factor in their well-being and that it would be important to keep them together if possible.

The court stated that it was clear that Raymundo had a close relationship with appellant and that he loved appellant, and that the court did not need Raymundo to testify to that. Appellant's attorney then stated he wanted Raymundo to testify as to his perception of the role that his father plays in his life. The court repeated that it was understood that they had a close relationship and that the court did not have to hear such testimony from a six-year-old.

Father then testified that he visited Raymundo once a week for about an hour and that during the visits they would eat, talk and play, and that he always brought a toy. Raymundo would sit on his lap and hug him. Appellant bought a bicycle for Raymundo, taught him to ride, helped the child with math, and got him drawing books and a video game. He also testified that Raymundo had no other father figure in his life.

We cannot conclude that the juvenile court abused its discretion in not permitting Raymundo to personally testify. Every element of the offer of proof appellant proffered was before the court. It was not necessary to require Raymundo to testify as to these matters. The court expressed its concern that it was not in Raymundo's best interest to be put in a position to believe that he was responsible for the outcome of the proceedings. We find the court's concern to be legitimate and well taken. There was no abuse of discretion, and we find no denial of due process.

II. Appellant Did Not Establish an Exception to Termination

Appellant contends that termination of his parental rights was error because he established a "benefit exception" pursuant to section 366.26, subdivision (c)(1)(A) that there was a "compelling reason for determining that termination would be detrimental to the child" because he had maintained regular visitation and contact with Raymundo and Raymundo would benefit from continuing the relationship.

The Courts of Appeal have applied both the substantial evidence and the abuse of discretion standards to review the applicability of the section 366.26, subdivision (c)(1) exceptions. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*).) Because the parties proceed under the substantial evidence standard of review, we do so as well. The appellant must demonstrate that there is no substantial evidence to support the challenged findings.

While it is true that appellant had regularly visited his son, the court concluded that even if reunification services were started again, there was no showing that appellant would have the ability to parent and protect the child. And though appellant was the biological father and enjoyed a good relationship with the child, even after being in the

system from February 2002 to November 2006, he still had not been able to reunify with Raymundo. As the court stated in *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348: "The exception provided in section 366.26, subdivision (c)(1)(A) must be considered in view of the legislative preference for adoption when reunification efforts have failed. [Citation.] So viewed, the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent. The section 366.26, subdivision (c)(1)(A) exception is not a mechanism for the parent to escape the consequences of having failed to reunify."

Appellant failed to demonstrate that a continued relationship with him would benefit Raymundo in a manner in which "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with" his adoptive parent. (*Autumn H., supra,* 27 Cal.App.4th at p. 575.) The record discloses substantial evidence to support termination of appellant's parental rights.

Raymundo is now seven years old. He was first removed when he was two years old. And although he was returned home twice, he was twice again detained. He has been under the supervision of the court for more than half of his life. Raymundo has been diagnosed with ADHD and moderate mental retardation, and to treat these conditions he receives psychotropic medication, special education and therapy. He has made progress in his emotional, cognitive and behavioral development. Yet appellant continues to disagree with this course of treatment, insisting that his son is "not crazy." As for the retardation issue, in discussing Raymundo's special educational needs, appellant has taken the position that Raymundo should not be forced to learn until he is older and ready to learn. The social workers have commented that appellant is in denial of his son's condition and needs.

On the other hand, Raymundo's maternal grandmother drives the children to school every day, takes them to medical appointments, and is willing to work with them to address any issue. She quit her job and moved to California from Colorado in order to care for the children. She has a "nurturing and loving relationship" with the children and

Raymundo has said that hers is the best home ever and he wants to stay there with his brother. The court has made every effort to keep the brothers together, even delaying Jose's permanent adoption in order to do so. Appellant has expressed his desire to have the boys separated and has pointedly ignored Jose when the two boys are together. Certainly, this behavior must cause Raymundo uneasiness and distress. We find the evidence amply supports the court's conclusion that Raymundo's relationship with appellant was outweighed by the minor's ability to stay with his brother, remain in a stable loving environment with his grandmother, and to ultimately be part of a permanent relationship.

DISPOSITION

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ